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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether school authorization for an organized student-initiated religious club meeting for worship and other religious activities in a public high school, during or at times associated with the school day, violates the first amendment's establishment clause.

2. Whether school authorization for an organized student-initiated religious club meeting for worship and other religious activities in a public high school, during or at times associated with the school day, is compelled by the first amendment's free speech clause when the club is organized during an activity period allowing meetings for other student clubs.

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STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for the Respondents.

Brief Amici Curiae of the Anti-Defamation League of B'nai B'rith and Americans for Religious Liberty in Support of Respondents

Amici support the position of respondents and respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit in the above captioned case be affirmed.*

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs in such cases as *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *Abington* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty is a non-profit, nationwide educational organization with members representing the entire religious spectrum. Americans for Religious Liberty is dedicated to defending religious liberty for all persons, and maintains that the defense of religious liberty requires as strict as possible adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

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* Petitioner and Respondent have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

INTRODUCTORY STATEMENT

This case presents the Court with a fundamental question under the first amendment's guarantee of freedom of religion and separation of church and state. That separation guarantee arising from the establishment clause is vital to the preservation of our religious freedom and pluralism. Government neutrality in matters of religion ensures that all religions keep an equal relationship with government, and are able to confront each other as equals, without competitive discord. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 622-623.

At issue is whether this separation principle is violated by provisions for so-called "equal access"[1] -- to public school facilities for student-initiated religious clubs organized at times associated with the school day.

Amici submit that it is. For when clubs are organized for worship and other religious activities in our public schools, this form of religious expression, notwithstanding its private or voluntary origins, implies state support, approval, or endorsement. When permitted to meet and engage in religious activities on public school grounds in the context of the school day, subject to school supervision and apparent school sponsorship, religious worship clubs constitute government-sponsored speech. Such government-sponsored religious speech is not entitled to the protections accorded to individual or nongovernmental group religious speech because of the establishment clause mandate. The state may not promote or endorse religion, even where such promotional endorsement is non-preferential, *see, e.g., McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948) (striking multi-denominational

1. "Equal access" is the term used by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to describe such a student-initiated religious club organized on public university premises. The latest such policy was enacted by the Congress in the Equal Access Act, 20 U.S.C. §§ 4071 (enacted August 11, 1984). It provides in relevant part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access . . . to . . . any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other contents of the speech at such meeting.

religious instruction in public schools), and even when the promotion or endorsement is consented to by the individuals involved. *See, e.g., Abington* v. *Schempp,* 374 U.S. 203, 229.

Activities which take place in the public schools involve the implication or presumption of state sponsorship. This sponsorship is inferred from the nature of the public schools, which were created by the state to serve for a "public function" -- to educate our young citizenry. *See Abington,* 374 U.S. at 242 (Brennan, J., concurring). To implement this goal elaborate government machinery has been put into place: the government gathers together the students, it requires their attendance, it takes responsibility for them while they are on school premises, and it is the duty of government employees to effectuate the government's educational purpose by setting and meeting curricular governmental standards.

This government control and involvement in the public schools presents questions of government endorsement or sponsorship of religion when religious activities are organized in the schools. The elements of state endorsement impermissible under the establishment clause are the government's action in approving the activities of a religious club, and the effect of the use of school grounds during the school day, of organizing the clubs during compulsory attendance hours and the use of state employees to monitor the clubs.

Contrary to "equal access" theory, the implication of state endorsement is not vitiated by the students' initiation of the religious activities. *See, e.g.,* Brief for Petitioners at 11. This Court has repeatedly held voluntariness does not validate a practice otherwise impermissible on establishment grounds. *See Abington,* 374 U.S. at 225. Moreover, the origins of a religious activity do not necessarily determine the presence or absence of state sponsorship of that activity. *See, e.g., McCollum,* 333 U.S. 203.

Further the implication of state endorsement is not vitiated by the "equal treatment" of religious and secular activities. *See, e.g.,* Brief for the United States at 16. Equal treatment in a public forum does not raise establishment problems because in such a forum there is a low level of government involvement or endorsement. *E.g., Cantwell* v. *Connecticut,* 310 U.S. 269 (1940). In

contrast, in a public school where government involvement is pervasive, such equal treatment does not overcome the establishment clause problem.

Thus "equal access" collides with the implication of state endorsement of religious activities in the public schools. The theory of equal treatment for all activities -- religious and nonreligious alike -- is facially appealing. Yet, the first amendment's special protection of freedom of religion singles out religion and only religion for insulation from governmental action. *See Engel*, 370 U.S. at 432. Nowhere is this principle more important, and nowhere has it been more severely tested than in our public schools. *See, e.g., McCollum*, 333 U.S. 203.

The Court should here affirm the separation principle and preserve the "public function" of our public schools. To be sure, limiting the use of schools for organized religious activity treats religion differently from other activities. Yet it does not affect other alternative sites for religious expression and it guarantees that the public schools will not be used in ways that diminish rather than enhance an individual student's religious freedom. It maintains the neutrality of government in matters of religion. *See Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4671 (June 4, 1985).

I.

THE ESTABLISHMENT CLAUSE MANDATE INSULATING RELIGION FROM GOVERNMENT IS VIOLATED BY ORGANIZING RELIGIOUS CLUBS ON SCHOOL PREMISES AT TIMES ASSOCIATED WITH THE SCHOOL DAY

A. The Establishment Clause Mandate In This Case

The application of the establishment clause mandate to the public schools was recently reaffirmed by this Court, in *Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4668-4670 (June 4, 1985). It protects "an individual's freedom to choose his own creed." *Id.* at 4669. That individual religious freedom is jeopardized where the "gain(ing) . . . of adherents" for one religion or another is facilitated by the state through the use of the public schools. *See Abington*, 374 U.S. at 228 (Douglas, J., concurring).

That the issue is the use of the public schools for religious activities is conceded by petitioners. Under the facts of this case, 741 F.2d at 542, where equal access has been litigated, *see, e.g., Widmar,* 454 U.S. at 269, and as is contemplated by the Equal Access Act, *see* sections 802 (a), (d)(1), (2), equal access is sought for group prayer and other religious activities. Group prayer is clearly a religious activity. *See Engel,* 370 U.S. at 424 (1962); *Karen B.* v. *Treen,* 653 F.2d 897, 901 (5th Cir. 1981), *aff'd.*, 455 U.S. 913 (1982). To the extent that Bible reading and religious discussions are also involved, outside of the context of objective curricular presentations, these activities too are religious. *See Stone* v. *Graham,* 449 U.S. 39 (1980), *citing approvingly to Abington,* 374 U.S. at 225. The religious nature of these activities -- at times associated with the school day, under teacher supervision, in public schools paid for by state and federal funds -- violates the first amendment's establishment mandate. *See, e.g., Wallace* v. *Jaffree,* 53 U.S.L.W. 4665.

That mandate prohibits government promotion of religious activities because such promotion threatens individual religious freedom. *Id.* at 4669. Individual religious freedom is compromised when public school students who are compelled by law to go to school are confronted with organized worship, on school premises, during the school day and under school supervision. While the choice of joining the worshippers may be characterized as "voluntary," *see* Brief for Petitioners at 38, the confrontation with the worship service is not. Accordingly, the student is put in the position of deciding whether to join in religious activity, often organized by a group that seeks adherents, *see infra* at 8-10, and is drawing on the benefits of the implied state approval arising from the public school setting. Indeed, one of the primary reasons evangelical and other religious groups seek to have these activities in the public schools is the impression of state sponsorship which accompanies the choice of such a site.

B. Equal Access Religious Clubs Violate the Lemon Test

In its consideration of religious activities in the public schools, this Court has consistently applied the tripartite test set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971). *See, e.g., Jaffree,*

53 U.S.L.W. 4665. Pursuant to this test, equal access would not offend establishment clause scrutiny only if it could pass the three-pronged analysis: First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, [the policy] must not foster an excessive government entanglement with religion." *See Widmar*, 454 U.S. at 271, *citing approvingly to Lemon*, 403 U.S. at 612-613.

Amici submit that equal access contravenes all three prongs of this test. As conceded by petitioners, its purpose is religious. While the school board herein rejected implementation of the club, were the club to be allowed today, both its subsequent sanction by the school board and its purpose as imputed through today's application of the Equal Access Act would be religious. Second, the effect of allowing religious clubs in the schools is to advance and endorse those religious activities which are organized therein. As held by the Third Circuit, allowing the use of public schools for organized religious activities extends to religious clubs the aid and endorsement of the school. This aid and endorsement advance the purpose of these religious clubs. In so doing, they also threaten the beliefs of non-participating students who, in being compelled to go to school, must resist religious coercion. 741 F.2d at 560.

Last, equal access requires excessive government entanglement in violation of the third prong of *Lemon*, 403 U.S. at 612. The Court of Appeals so held. 741 F.2d at 555-556. Equal access religious clubs place a great burden of continuous monitoring on school personnel adequately to supervise the club meetings and activities so as to minimize "the message of endorsement" of religion conveyed by school sponsorship. *Jaffree*, 53 U.S.L.W. at 4674 (O'Connor, J., concurring).

1. *The Religious Purpose of Equal Access*

a. *The Williamsport School Board's Denial*

The *Lemon* purpose inquiry, as this Court stated in *Wallace* v. *Jaffree*, looks to whether the government's actual purpose was to endorse or disapprove of religion. 53 U.S.L.W. at 4670.

As concerns equal access policies, in *Widmar* v. *Vincent*, this Court held the central factors in the inquiry concerning the purpose of equal access policies are the role of the educational institution with regard to the timing of the adoption of the equal access policy and its intended use as expressed in the text of the policy. *Widmar*, 454 U.S. at 271. Applying these factors to the instant case, the Third Circuit held that given the preexisting secular nature of the policy in Williamsport, and the school board's denial of the student worship request, that there was no evidence of religious purpose. 741 F.2d at 551. To the extent the Third Circuit's analysis was grounded on the school board's denial, it is clear that had the school board elected to allow the club, under this Court's test set forth in *Widmar* that action would have been considered evidence of religious purpose. *See, e.g., Lubbock* v. *Lubbock*, 669 F.2d 1038, 1043 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Collins* v. *Chandler*, 644 F.2d at 762 (9th Cir. 1981).

b. *Bender In the Context of the Equal Access Campaign – Congressional Religious Purpose in Enacting the Equal Access Act To Overrule Case Law Holding Equal Access to be Unconstitutional*

As the Third Circuit decided this case, the United States Congress enacted the Equal Access Act.[2] This Act has a direct bearing on the instant case, reflecting the purpose and effect of equal access policies. The Act's intent is to overrule those cases disallowing equal access, including *Brandon* v. *Bd. of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) and *Lubbock* v. *Lubbock*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 454 U.S. 1123 (1981).[3] *See* 130 Cong. Rec. S.8334, 8336

2. 20 U.S.C. § 4071 (passed in the House of Representatives on July 25, 1984, one day before Third Circuit delivered its decision; signed into law on August 11, 1984). Its passage culminated a campaign in the courts and Congress seeking to use the public schools for religious activities.

3. Contrary to the Briefs for the U.S. at 16, and for the Petitioners at 24-25, n.23, which erroneously rely on *dicta* in two cases, both *Bell* v. *Little Axe*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *and Nartowicz* v. *Clayton County School District*, 736 F.2d 646, 649 (11th Cir. 1984) held the equal access policies before them to be unconstitutional. Just as this brief went to press, the 10th Cir. became the fifth

(daily ed. June 27, 1984). Insofar as the Act would allow those prayer club activities organized on school grounds at issue in the instant case, *see infra* note 18, *see also* Brief for the United States at 2 n.2., *amici* submit this Court should hold it unconstitutional.

This Court has consistently construed the first amendment's mandate of separation to mean that government may not legislate concerning religion. *See Jaffree*, 53 U.S.L.W. at 4670. "[T]he Establishment clause . . . withdrew all legislative power respecting religious belief or the expression thereof." *Abington*, 374 U.S. at 222. The Equal Access Act is patently religious in purpose, pursuant to the factors set forth in *Widmar*: the timing of its adoption, *i.e.*, its legislative history, and its text. *See* 454 U.S. at 271. *See also Jaffree*, 53 U.S.L.W. at 4670.

For two years prefatory to adoption of the final Act, the United States Congress considered numerous equal access proposals seeking to protect religious group prayer meetings in the public schools. The two year legislative history of the Act shows that its purpose was to extend to the public high schools this Court's decision in *Widmar*, allowing worship clubs in certain public universities with open forums.[4] *See, e.g.*, 130 Cong. Rec. S.8331, 8334-8336 (June 27, 1984) (remarks of Sens. Hatch, Denton).

U.S. Court of Appeals to hold equal access unconstitutional by affirming *Bell*.

4. Proponents of equal access legislation made clear their intentions to extend the scope of *Widmar* to the high schools. In Congressional equal access hearings, Sen. Hatfield stated: "The bill is a straightforward measure to apply the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to public high schools which receive federal aid." *Equal Access: A First Amendment Question: Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (prepared statement of Sen. Hatfield) [hereinafter *Sen. Jud. Comm. Equal Access Hearings*].

Some of the Senators involved in equal access had already been involved in the court cases. Senator Hatfield and twenty-three other members of the Senate had filed an *amici curiae* brief with this Court in the *Lubbock* case asking the Court to grant review and extend the authority of *Widmar* to the high school level. When the Court denied *cert.* in *Lubbock*, 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983), these Senators turned to the legislative route.

While deleting the special reference to religion found in predecessor bills,[5] the final Act retains this single religious purpose. *See Stone* v. *Graham*, 449 U.S. 39, 41.

Beyond the Act's legislative history, its text indicates religious purpose. While the final Act extended its protection of clubs from those which were solely religious, as provided for in the Religious Speech Protection Act, to all clubs, the deletion of the operative earlier language barring discrimination on the basis of the religious content of the speech and substituting protection from discrimination on the basis of "religious, political, philosophical or other contents," § 802(a), fails to mask the religious purpose of the Act. Many provisions of the statute are devoted to protecting religious activities from establishment challenge by seeking to limit the extent of government sponsorship of those activities.[6] Further, there are sections which specifically contemplate organized prayer indicating that the purpose of the Act is statutorily to authorize organized prayer meetings in the public high schools nationwide.[7]

c. *The Equal Access Campaign -- A Sectarian Religious Purpose*

In addition to the general legislative religious purpose underlying the Equal Access Act, equal access has a sectarian religious

5. *See Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *House Subcomm. on Elem. Sec. and Voc. Education Religious Speech Protection Act Hearings*].

6. These provisions, which are constitutionally unnecessary as to any other type of meeting, reflect the Act's true purpose of facilitating prayer activities. These provisions include requirements that the meetings be voluntary and student-initiated, § 802(c)(1), and that there be no sponsorship of the meetings by the school, the government or its agents or employees. § 802(c)(2). Outsiders may attend and participate, but may not direct, conduct, control or regularly attend the meetings. § 802(c)(5). Employees of the school may be present at religious meetings only in a non-participatory capacity. § 802(c)(3). This last provision singles out religious meetings and further reflects the Act's religious purpose.

7. The Act expressly indicates that it does not authorize government to "influence the form or content of any prayer or other religious activity," or "to require any person to participate in prayer or any religious activity." § 802 (d)(1),(2).

purpose. *See Larson* v. *Valente*, 456 U.S. 228 (1982). For equal access provides a greater benefit to some religions than others. In providing a captive audience in the schools, it facilitates the gathering of adherents for those religions seeking to evangelize or proselytize. *See Abington*, 374 U.S. at 228 (Douglas, J., concurring).[8]

The history of equal access both in its development in case law and legislation reflects that primary proponents are those religious groups which seek to use the public schools to spread their religious message. *See, e.g., Widmar*, 454 U.S. 265 n.2. In *Widmar*, the student organization asserted its "purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus. . . . In fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ." *Chess* v. *Widmar*, 480 F.Supp. 907, 911 (W.D. Mo. 1979). *See also Nartowicz* v. *Clayton County*, 736 F.2d 646 ("Youth for Christ" desires equal access); Education Week *supra* note 8.[9]

The equal access use of the public schools advances proselytizing in a number of ways. The state provides an audience through the compulsory attendance laws. *See McCollum*, 333 U.S. at 210. The public school media, *e.g.*, bulletin boards, loudspeakers, may be used to announce the clubs. *See, e.g., Lubbock*, 669 F.2d at 1039; *Bell* v. *Little Axe*, No. CIV-81-620-T.[10] In addition to these factors, often outside church leaders will use the school-gathered

8. *See Young Life Youth Ministries Activities Raise Policy Issues for Educators*, Education Week (October 28, 1983) (Major evangelical organization have set up high school ministry programs). *See also* Note, 33 *Rutgers L. Rev.* 1008, 1047 (1981). "Students who are evangelical Christians may have more difficulty expressing their religious beliefs when denied on-campus meeting places. Students meet not only for personal worship and religious study, but also as a way of motivating other students to respond to the group's message; on campus meetings may be crucial in this latter respect." *Id.*

9. *See House Subcomm. on Elem., Sec. and Voc. Education Religious Speech Protection Act Hearings*, 72 (statement of Samuel Ericcson, Director, Washington Office, Christian Legal Society). *See also id.* at 91.

10. The evangelical use of school media to announce equal access meetings was testified to by Campus Crusade for Christ. *See Senate Jud. Comm. Equal Access Hearings* 143. Post Equal Access Act, school media have also been used to announce club meetings. *See* N.Y. Times, March 23, 1985, A.26 (Hicksville High School, Long Island, N.Y.,

audience to address the students. Youth assemblies may be held, *see, e.g. Lubbock*, 669 F.2d 1038; *Bell* v. *Little Axe*, No. CIV-81-620-T, or youth ministers may roam about the school, *see* Education Week, *supra* note 8. Post Equal Access Act, evangelical youth ministers have become "integrally involved" in religious clubs. *See* N.Y. Times, Mar. 23, 1985, A.26.

The equal access campaign thus intends to use the schools for the purpose of aiding religious faiths to gather adherents. This purpose is impermissible in the public schools. *See Abington*, 374 U.S. at 228; *McCollum*, 333 U.S. at 211. Other alternative forums for proselytizing exist. *See Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

2. *Equal Access Clubs Organized in the Public Schools Have the Effect of Government Advancing and Endorsing Religion*

a. *Equal Access Clubs -- A Presumption of State Endorsement When Religious Activities are Organized in the Public Schools*

This Court has repeatedly held where religious activities are held in the state sponsored public schools that such activities must be evaluated under special scrutiny. This scrutiny wou'd disallow religious activities in the public schools which are sustained elsewhere. Accordingly, government sponsored religious displays and sectarian prayer, barred from the public schools, have been allowed in parks, state legislatures and public universities. *Compare Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984); *Marsh* v. *Chambers*, 103 S.Ct. 3330 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981); *Saia* v. *New York*, 334 U.S. 558 (1948); *with Stone* v. *Graham*, 449 U.S. 39 (1980) (striking Ten Commandment display posted on public school wall); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (striking New York State prescribed prayer), *Abington* v. *Schempp*, 374 U.S. 203 (1963). *Accord Tilton* v. *Richardson*, 403 U.S. 672, 685-86 (1971).

This prior Court consideration of the level of government sponsorship found in the public schools would appear to afford a

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equal access meetings part of school loudspeaker morning announcements).

presumption in this case constituting "the judicial interpretation of social facts" of the public schools. *See Jaffree*, 53 U.S.L.W. at 4675, *citing Lynch*, 104 S.Ct. 1355, 1369 (O'Connor, J., concurring).

b. *Equal Access Clubs Draw Upon The State Benefit and Imprimatur*

1) *Equal Access Theory -- The Irrelevance to Establishment Analysis of the Origins of Religious Activity*

Equal access proponents claim limiting religious clubs to those which are student initiated defies a claim of state sponsorship under the establishment clause. *See, e.g.*, Brief for Petitioners at 11,19,20; *Bender* v. *Williamsport*, 741 F.2d at 565 (Adams, J., dissenting). To so argue is to claim that the establishment bar is "limited to precluding the State itself from conducting religious exercises." *Abington*, 374 U.S. at 229. Yet this Court has failed to distinguish between state sponsored activities which are state initiated, as in *Engel* or *Abington*, and those held at outside religious instructor or parental initiative in *McCollum*, 333 U.S. 203. *See Abington*, 374 U.S. at 224-225. It has repeatedly held voluntariness of a religious activity to be "no defense to a claim of unconstitutionality under the Establishment Clause." Id. at 225.[11]

Instead this Court has held establishment concerns to prescribe a course of complete neutrality by government toward religion, *Jaffree*, 53 U.S.L.W. at 4671. These concerns bar the state from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." *Abington*, 374 U.S. at 229. This principle is threatened when the state authorizes the use of its schools and attendance requirements for religious clubs.

11. Whether the activity concerns voluntary student attendance at religious instruction classes geared to all faiths, *McCollum*, 333 U.S. 203 (1948), the voluntary reading of Bible verses by students, *Abington*, 374 U.S. 203 (1963), or a voluntary student-initiated prayer at the beginning of the school day, *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), all have been found to unconstitutionally advance religion in the public schools despite the voluntary nature of the activity. Three courts of appeals considering equal access have also determined voluntariness to be irrelevant. *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978. *See also Bender*, 741 F.2d at 554.

2) *Equal Access Clubs in the High Schools Fail the Widmar "Effect" Test*

The two factors gauging the effect of unconstitutional government sponsorship set forth by this Court in *Widmar* are the nature and extent of the government benefit provided to the equal access religious activity and the government "imprimatur" or "endorsement" of religion. 454 U.S. at 274. *See Jaffree*, 53 U.S.L.W. at 4670; *Engel*, 370 U.S. at 429.

Applying these factors to the high school prayer club proposal herein, the Third Circuit correctly held that "such group activity, when conducted within the hours of compulsory attendance, on school premises, and under official sanction and supervision, promotes an impermissible atmosphere of religious partisanship in violation of the establishment clause." 741 F.2d at 560.

In the high school setting, the greater extent of government sponsorship and involvement presents a greater government benefit to religion and imprimatur than that present in the university.[12] *See Bender*, 741 F.2d at 552.

a) *Unconstitutional Government Benefit*

Government aid to religion when religious meetings are organized in the public schools includes a number of benefits which assist religions in the furthering of beliefs: the provision of the free use of tax paid classrooms, heat and light, free teacher or government authority monitoring, and the use of state compulsory attendance laws to provide both a government forum and a government gathered audience.[13]

12. In *Widmar* on the other hand, the Court upheld equal access where only one factor -- the use of the classrooms -- was provided to the clubs. In *Widmar* there was no compulsory state law concerning attendance in the university. And other non-classroom costs related to student clubs were borne not by taxpayers but rather were paid for out of student fees. 454 U.S. at 265.

13. These benefits are at issue in this case. Further, most of these benefits are contemplated by the Equal Access Act. Pursuant to section 802(d)(3), public funds are authorized only for the "incidental costs of providing the space of student-initiated meetings." Funding for other items such as use of school funding, school mediums, and salaries for teacher supervision, is neither expressly authorized nor barred. It may conflict with sections of the Act generally barring school sponsorship of the meetings. §§ 802(c)(2), 803(2).

Such government benefits to religion have been consistently denied by this Court, including the use of public school buildings for sectarian purposes, *compare McCollum*, 333 U.S. 203, *with Zorach* v. *Clauson*, 343 U.S. 306 (1952), the benefit of the state gathered audience pursuant to the state compulsory attendance laws, and the free teacher monitoring, *Abington*, 374 U.S. at 223. When these benefits are provided to religious activities it is coercive to nonbelievers. It "is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *McCollum*, 333 U.S. at 210. Government may not use its "power and prestige to support or influence the kinds of prayer the American people can say." *Engel*, 370 U.S. at 429.[14]

This government benefit threatens the liberty of religious minority students, as attested to in the Equal Access Act legislative process, whereby almost exclusively religious minority groups presented testimony opposing the Act because of fear of having their children, a state-gathered captive audience, exposed to proselytizing by students, teachers and outsiders through the benefit of the state school system machinery. *See, e.g., Sen. Jud. Comm. Equal Access Hearings* 232.[15]

b) Imprimatur

This Court has repeatedly held the establishment mandate to bar government from "a message of endorsement . . . of religion." *Jaffree*, 53 U.S.L.W. at 4671; *see Lynch* v. *Donnelly*, 104 S.Ct. at 1368 (O'Connor, J., concurring). "[O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval." *Engel*,

14. Added potential benefits which were rejected by the students in this case, *see* 741 F.2d at 556, are the use of school mediums to advertise school equal access meetings. *See, e.g., Nartowicz*, 736 F.2d at 649-650 (bulletin boards, loudspeakers); *Lubbock*, 669 F.2d 1038 (loudspeaker); *Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 16 (bulletin boards).

15. That this fear is not hypothetical is evidenced by the pre-existing use of the schools for this purpose, through youth ministry programs now legalized by the Equal Access Act. *See* Education Week *supra* note 8.

370 U.S. at 429. *See also Mueller* v. *Allen*, 103 S.Ct. 3062 (1983).

This Court in *Widmar* and the four courts of appeals assessing the unconstitutionality of equal access policies have emphasized the importance of the imprimatur inquiry. *See Widmar*, 454 U.S. at 274; *Bender*, 741 F.2d at 551-557; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-1046; *Brandon*, 635 F.2d at 978-979.

As this Court has held in its many cases disallowing religious activities in the public schools, at issue is the presumption or implication of government sponsorship flowing from the government purpose in creating the public schools and the government machinery used to implement this purpose. Compounding the level of government endorsement present in the public schools is a subjective component of the perception of imprimatur because of the youth and impressionability of school children. Both aspects -- the "objective" and "subjective" imprimatur -- are crucial in distinguishing religious activities in the high schools from those in the university. *Compare Bender*, 741 F.2d at 552-553; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-46 *and Brandon*, 635 F.2d 978-979, *with Widmar*, 454 U.S. at 274 n.14.

i) Equal Access Clubs Held in Public Schools Invoke Government Endorsement.

There are numerous objective factors constituting government endorsement when equal access clubs are held in the schools: school club approval, club time during the school day in association with compulsory state attendance, teacher supervision of the clubs, and use of school mediums.

aa) School Approval.

Where equal access religious clubs are organized pursuant to a school policy recognizing extracurricular student clubs or where the school board must approve all school clubs, as was the case in Williamsport, 741 F.2d at 543 n.6, this school action constitutes government approval or imprimatur violative of establishment concerns. When such approval can be accorded to one religious non-curricular club only, as in the instant case where Petros was the only proposed religious club, 741 F.2d at 543 n.8, or as is

permissible pursuant to the Equal Access Act,[16] the effect of unconstitutionality would be even greater, as this Court held in *Widmar*, 454 U.S. at 271-272. Such approval would give the one sectarian religious club the stamp of goverment imprimatur already deemed violative of establishment by this Court. *See Engel*, 370 U.S. at 429.

bb) Timing Associated With the School Day

The timing of the equal access clubs contiguous with the school day, as this Court held in *Wallace* v. *Jaffree*, is a central factor creating school approval of the clubs. 53 U.S.L.W. at 4671, *citing McCollum*, 333 U.S. at 227. *See, e.g., Bender*, 741 F.2d at 552; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 979. Close association of religious activities with the school day implies recognition of the activities by the school. As this Court held in *Abington*, 374 U.S. at 288, "The exercises are held in the school buildings and perforce are conducted . . . under the authority of the local school authorities and during school sessions." The timing is deemed to coincide with the government-sponsored school day, whether the club occurs during or after the school day.[17]

Another equally important factor contributing to government sanction is the use of the compulsory attendance laws. As held by this Court in *Juffree, Abington* and *Engel*, attendance requirements create the appearance of a state-sponsored captive audience for religious activities and undermine any notion of volunteerism. Government endorsement has "special force in the public-school context where attendance is mandatory. . . . 'That a child is offered an alternative may reduce the constraint, it does

16. § 802(b) provides a limited forum exists when there is one noncurricular club; accordingly one religious club would be enough to trigger the protection of the Act.

17. *Compare Bender*, 741 F.2d at 553 (clubs meet during the student activity period during the school day), *with Brandon*, 635 F.2d at 979 (official school day begins when "buses discharge students . . . any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal 'home room' period . . . would occur during school hours"); *Bell* v. *Little Axe*, No.CIV-81-620-T, slip op. at 15 (clubs meet in the morning "during the school day although prior to the commencement of classes") *and Lubbock*, 669 F.2d at 1045 (clubs meet before buses arrive and after the buses run deemed to occur "at a time closely associated with the beginning or end of the school day").

not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain.' " *Jaffree*, 53 U.S.L.W. at 4671, *citing McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

In this regard, the *Bender* court distinguished the public high school from the university in *Widmar*:

> Unlike universities, attendance for most high school students is made compulsory by state law. Moreover, high school instruction is given in a structured and controlled environment and in more confined facilities than is usual in the open, free and more fluid environment of a college campus.

741 F.2d at 552. Thus, high school students are more likely than college students to infer government endorsement of religion.

The facts in the instant case occur within the compulsory attendance period, twelve minutes into the first period (homeroom) of the day. 741 F.2d at 543. Other equal access policies such as those struck by the Courts of Appeals for the Eleventh, Fifth and Second Circuits, were deemed to occur sufficiently contiguous to compulsory school hours to be considered a part of the school day. *See Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1046-1047; *Brandon*, 635 F.2d at 978-979. *See also Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 25; *supra* note 17.

The only relevant distinction concerning timing for purposes of the establishment question is whether the religious activities occur on school premises when the school is not functioning as a school and as a forum open to the public under state law. *E.g.*, Okla. stat. tit. 70, § 5-130 (1981). At that time the compulsory education machinery would not be in operation, and there would be no teachers or students on the school premises necessarily.[18]

18. Pursuant to the Equal Access Act, the timing of the clubs is somewhat unclear. They are to meet on school premises during "non-instructional time." § 802(b). This is defined by the Act to mean "time set aside by the school before actual classroom instruction begins or after classroom instruction ends." § 803(4). Under the majority view, this would allow clubs just before and after the school day as considered to be associated with the compulsory attendance laws struck in *Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1046-47; *Brandon*, 635 F.2d at 978-979; *Little Axe*, No. CIV-81-620-T, slip op. at 25 (holding unconstitutional before class prayers and considering them to

See Country Hills Christian Church v. *Unified School District*, 560 F.Supp. 1207 (D. Kan. 1983); *Resnick* v. *East Brunswick Township Board of Education*, 77 N.J. Super. 88, 389 A.2d 944 (1978).

cc) Teacher Supervision

Together with the government approval inherent in the use of the school day and in the compulsory attendance laws is the use of teacher supervision for monitoring of the clubs. While drawing the line at teacher participation dissallowed in the school religion cases, equal access contemplates "exercises . . . held in the school buildings under the supervision . . . of teachers employed in those schools," stricken in *Abington*, 374 U.S. at 225.[19] Accordingly, three appellate decisions have considered the issue of faculty monitoring to constitute state approval of equal access activities. *Bender*, 741 F.2d at 552; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978. In considering the importance of this teacher monitoring, which is required by state laws for high schools but not universities, the *Bender* court again distinguished *Widmar*:

> [I]t is readily apparent that a school teacher or somebody associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school. Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government

take place "during the school day"). *See* 130 Cong. Rec. S. 8353 (daily ed. June 27, 1984) (regular instructional period is what the school would have when class is first scheduled in the morning -- maybe it is 8:30, maybe it is 9 -- and it ends at 3:30" (remarks of Sen. Hatfield). Pursuant to a minority interpretation in the legislative history, *see* 130 Cong. Rec. S. 8356 (daily ed. June 27, 1984) and a position advocated by the Solicitor General in this case, *see* Brief of the United States at 2 n. 2, it would also allow clubs during the school day such as those at issue in this case.

19. The line drawn between supervision and participation is a tenuous one. *See infra* note 25 (discussing teacher entanglement); N.Y. Times, Mar. 23, 1985, A.26, col. 3 (club organized under Equal Access Act supervised by teacher declaring "I can't participate . . . But it is very difficult when people are praying not to pray along").

endorsement was part of the *Widmar* activity program . . .

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741 F.2d at 552-553.[20]

Such state approval -- impermissible as to religious clubs -- constitutes the very government endorsement of religion likely to increase adherents barred by this Court. *Abington*, 374 U.S. at 229.

dd) Youth and Impressionability of School Children.

Compounding the objective factors creating government imprimatur when high school prayer clubs are held in the schools is the youth and impressionability of the school children perceiving that government endorsement.

This Court in *Widmar* distinguished between university and younger students in their ability to discern government endorsement when religious activities are organized in the public schools. *See Widmar*, 454 U.S. at 274 n.14. "University students are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality." *Id.* This concern with the way in which students perceive government sponsorship follows the Court's consistent higher level of protection for public school students, recently reaffirmed in *Jaffree*, 53 U.S.L.W. at 4671, *citing approvingly to Abington*, 374 U.S. at 290 (Brennan, J., concurring); *see Marsh* v. *Chambers*, 103 S.Ct. 3330, 3335 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"); *Tilton* v. *Richardson*, 403 U.S. 672, 685-686 (1971) (distinguishing university students for their ability to recognize government assistance for a secular, rather than a religious purpose).[21]

20. Such monitoring is also contemplated under the Equal Access Act. While some provisions expressly authorize monitoring only for custodial purposes, *see* § 803(2) and it is to be "non-participatory" as to religious meetings, § 802(c)(3), other provisions of the Act extend permissible supervision to protecting the "well-being" of students and faculty, and to assuring that attendance at such meetings is "voluntary." § 802(f).

21. The youth and impressionability of high school students is minimized by the U.S. government, *see* Brief for the United States at 18.

The youth and impressionability of high school students is a central factor for all four circuits limiting *Widmar* to its facts in the public university. All held that student impressionability increases the possibility of government action being seen as one of endorsement. *See Bender*, 741 F.2d at 552-554; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-1046; *Brandon*, 635 F.2d at 978.[22]

Public school children cannot distinguish what in any event would be difficult to discern -- a difference between government sponsorship of some elements in the school program and not of others. The problem is not simply youth and impressionability, but rather how these factors combine with the sponsorship present in the public schools in the context of the school day.[23]

(Contradictorily, however, the government would argue that the same students could not perceive neutrality rather than hostility in a school's decision not to authorize a religious club. *See* Brief for the United States at 21.) Contrary to the government's claims, the testimony on the "Equal Access Act heard by the various Congressional committees was that of high school students such as Lisa Bender, and other groups in favor of equal access, *see, e.g., Sen. Jud. Comm. Equal Access Hearings*. No expert witnesses or psychologists testified. The "psychological studies" deferred to by the government in its brief are the basis of a student note. *See* Note, 92 *Yale L.J.* 499 507-509 (1983).

Sporadic recognition of the different level of impressionability between high schoolers and adults does emerge begrudgingly in the Congressional testimony, *e.g.*, in the context of a discussion with the author of this brief concerning the differences between government sponsored religious activities among adults as opposed to children, *see House Subcomm. on Elem., Sec., and Voc. Education Religious Speech Protection Act Hearings* 199 (statement of Rep. William F. Goodling: "Let me also say that the beauty of young people is that they are so different from adults. They're not locked into cement in any way, shape or form. They're very *flexible*, very *pliable*, very agreeable and certainly not locked in, as we adults become after a period of time.") Id. at 120 (emphasis added).

22. Under the Equal Access Act, students could be even younger than high schoolers. The Act extends to "secondary schools," § 802(a), but leaving the definition of same to state law. § 803(1). In some states such as New York, secondary school includes junior high, meaning that the Act could extend to as young as eleven-year-olds. It has already been applied to fifth graders. *E.g.*, Bair Middle School, Sunrise Cty., Fla.

23. Commentators who choose to rely only on the youth and impressionability of high school children miss the point. *See, e.g., Note, The Constitutional Dimensions of Student Initiated Religious Activities in the Public High Schools*, 92 *Yale L.J.* 499 (1983).

3) *Religious clubs in the public schools require excessive school entanglement*

This Court has held that religious activities in the schools create excessive entanglement by "putting the school in a position of governance over religious activity." *See Lemon*, 403 U.S. at 621-622. As recognized by the Third Circuit, equal access poses numerous entanglement problems. These include entanglement fostered by teacher supervision of the clubs, school regulation of resources used by the clubs, and the divisiveness resulting from the organization of sectarian religious clubs on school premises.

a) *Faculty Supervision*

When religious activities occur within the school day, impermissible school entanglement is an inevitable result of the supervision required by state laws placing responsibility for students during the day with the school. Such entanglement has been held to be fatal to equal access prayer meetings held on school premises. *Bender*, 741 F.2d at 556-557; *Lubbock*, 669 F.2d at 1047; *Bell*, No. CIV-81-620-T, slip op. at 16: *Trietley* v. *Bd. of Educ.*, 65 A.D. 2d 1, 409 N.Y.S. 2d 912, 917 (1978). "If the state must engage in continuing administrative supervision of non-secular activity, church and state are excessively intertwined," *Brandon*, 635 F.2d at 979. *See also Lemon*, 403 U.S. at 620-21; *Karen B.* v. *Treen*, 635 F.2d at 902; *Collins* v. *Chandler*, 644 F.2d at 762 (holding entanglement results from school supervision of prayer at student assemblies). This government entanglement problem extends, the Third Circuit held, to supervision by non-school employees who must be approved by the school, and thus involves entanglement when accompanied by the use of school facilities. 741 F.2d 556. *See Lubbock*, 669 F.2d at 1047 n. 16, *citing to McCollum*, 333 U.S. at 208.

In addition to custodial supervision, equal access clubs require monitoring for student initiation or voluntariness. "[S]urveillance will be required to guarantee that participation at prayer meetings remains voluntary." *Lubbock*, 669 F.2d at 1047. *See Lemon*, 403 U.S. at 620-621.[24] Such supervision raises

24. Such monitoring for voluntariness is also contemplated by the Equal Access Act. *See* §§ 802 (c)(3), (f), 803(2).

a serious challenge to individual religious freedom in a school. While state law requires a measure of school responsibility over students and students should be free from proselytizing efforts during school, achieving this presents a difficult problem, as the solution of school supervision of religious activities is equally untenable. For public school teachers are not trained to monitor and lead religious discussions.[25] Moreover such state involvement may well threaten an individual student's religious freedom by testing the truth of his or her beliefs. *See U.S.* v. *Ballard*, 322 U.S. 78 (1944).

b) *School Media*

In addition to teacher supervision, the organizing of equal access on school facilities triggers the need for school regulation of school resources, so as to avoid sponsorship of religious activities.[26] This problem was conceded by petitioners in this case, who offered to voluntarily forego use of school bulletin boards or public address systems. 741 F.2d at 556. This offer reflects that petitioners themselves understand that religious clubs may not be treated "equally" with other secular clubs. This special treatment the Third Circuit believed posed troublesome entanglement, requiring the school to constantly supervise Petros. *Id.*

c) *Divisiveness*

Sectarian equal access clubs organized in the public schools produce divisiveness in violation of entanglement concerns, by dividing students according to religion and belief at a time and

25. *See House Subcom. on Elem., Sec. and Voc. Education Religious Speech Protection Act Hearings* 42 (statement of Linda Tarr-Whelan, Dir. of Gov'tl Rel., National Education Association); *Sen. Jud. Comm. Equal Access Hearings* 201 (statement of Ms. Piccinini, Pres. Maryland Teachers Assoc., speaking on behalf of National Education Association).

26. *See, e.g., Nartowicz*, 736 F.2d at 650 (bulletin boards, school address system, signs); *Bell*, No. CIV-81-620 T, slip op. at 16 (school funding, bulletin boards); *Johnson* v. *Huntington Beach*, 68 Cal. App. 3d 1, 14; 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (funding, supervision of membership lists to avoid discrimination); *Cf. Healy* v. *James*, 408 U.S. 39 (1972) (funding provided for student meetings in university forum).

place where the the state has required the students to be. *See Lemon*, 403 U.S. at 624.[27]

Numerous courts have held divisiveness to result from equal access meetings. *Bell*, No. CIV-81-620-T, slip op. at 16; *Johnson*, 68 C.A. 3d 1,14; *Trietley*, 409 N.Y.S. 2d at 912. Such divisiveness results even where equal access gives rise to the best possible scenario -- numerous religious clubs instead of a single coercive one. For religious divisions in the public schools go to the heart of establishment principles which prohibit government aid to religions precisely to maintain peace between sects. "[G]overnment aid will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion has produced among its several sects)." J. Madison, *A Memorial and Remonstrance Against Religious Assessments*, ¶ 11 (1984), *reprinted at*, W. Hutchinson, R. Rutland, W. Rachal, *Papers of James Madison* 295-306 (1962). *See Mueller*, 103 S. Ct. at 3069; *Lemon*, 404 U.S. at 624.

This Court has recognized that nowhere is this more important than in our public schools. "In no activity of this state is it more vital to keep out divisive forces, than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring). *See Abington*, 374 U.S. at 242 (Brennan, J., concurring). As declared in *McCollum*, 333 U.S. 203, considering the constitutionality of multi-denominational sectarian religious instruction on public school premises, the students "will thus have inculcated in them a feeling of separation when [the public] school should be the training ground for habits of community..." *Id.* at 227 (Frankfurter, J., concurring).

27. While this concern appears to have recently been limited by the Court to cases involving direct financial support by government to religious institutions, *see Lynch*, 104 S. Ct. at 1364-1365, and *Mueller*, 103 S. Ct. 3062, 3071 n. 11 (1983), it has yet to be limited in the context of the public schools, which raise special divisiveness concerns. *See McCollum*, 333 U.S. at 227.

II.

THE ESTABLISHMENT PROBLEM POSED BY ORGANIZED GROUP RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS IS NEITHER MITIGATED BY EQUALITY OF ACCESS NOR OVERRIDDEN BY FREE SPEECH CONCERNS WHICH ARE MINIMIZED BY THE NATURE OF THE PUBLIC SCHOOL FORUM AND THE EXISTENCE OF ALTERNATIVES FOR RELIGIOUS EXPRESSION.

A. The Equality Mandate Inherent to Public Forums is Inapplicable to the Public School Given its Level of Government Sponsorship and Control.

1. *The Establishment Clause Mandates Special, Not Merely Equal, Treatment of Religion.*

Proponents of equal access maintain that all that is being sought is "equal treatment" for non-religious and religious activities alike. *See* Brief for United States at 16. Any government benefit is mitigated, equal access proponents argue, by the extension of that benefit to a broad group of secular activities. *See* Brief for Petitioners at 23-26.

While facially appealing, this "equality" argument is specious. It fails because it collides with our historic commitment set forth in the first amendment to treat religion specially. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943). As Madison declared and was affirmed by this Court in *Engel*, it is because religion is "too personal, too sacred, too holy." 370 U.S. at 432.

While this view of religious freedom is challenged by the Solicitor General in this case, with the claim that "equality of access" was the only objective of the framers, *see* Brief for the United States at 15, the history and evolution of the first amendment are flatly contradictory. *See Jaffree*, 53 U.S.L.W. at 4669. The equality argument also fails because it is grounded on public forum doctrine inapplicable to the public school situation herein.

2. *Equal Treatment of Religion and non-Religion Prevails in Public Forums Where the Low Level of Government Sponsorship Does Not Mandate Special Treatment as is Required in the Public Schools.*

The first amendment establishment mandate requiring that there not be government-endorsed religious speech is not in conflict with free speech principles in this case. For the equality principles upon which petitioners rely emanate from public forums which fail to present establishment problems, because of a low level of government sponsorship therein. Accordingly, in public parks and streets, equal treatment of religion and non-religion is mandated, with no attendant establishment problem. *See, e.g., Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 337 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

In these forums, religious expression rights including a right to proselytize are free and unfettered. *See, e.g., Cantwell*, 310 U.S. 296. Similar religious expression rights were recognized by this Court in a public university, where a pre-existing broad spectrum of expression reflected its designation by the university as an open forum. *See Widmar*, 454 U.S. at 268, 274. In *Widmar*, this Court found the benefit to the religion club was "incidental" and that no imprimatur was conferred by an open forum. Just as in the traditional public forum cases, there was no balancing of equal versus special treatment of religion, because the Court found no unconstitutional level of government sponsorship mandating such special treatment.

At issue for this Court is whether the public school may be likened to the public park and university. The metaphor, *amici* argue, is inapposite. As this Court has noted, all pieces of government property are not created equal. Government may preserve property under its ownership for a lawful purpose other than expression. *U.S. Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 (1981); *Greer* v. *Spock*, 424 U.S. 828[28] (1976). *See Perry* v. *Perry*, 103 S. Ct. 948, 958

28. A similar analysis was followed by the Second Circuit in *McCreary* v. *Stone* concerning the right of access by citizens seeking to place an unattended nativity scene display in a small traffic circle park. *See* 739 F.2d 716 (2d Cir. 1984), *aff'd in split decision*, 53 U.S.L.W.

(1983). In *Widmar*, the university was characterized as "a marketplace of ideas," 454 U.S. 263, 267 n. 5, *citing to Healy* v. *James*, 408 U.S. 169, 180 (1972). The university had no limit to its open forum policy which included all clubs, 454 U.S. at 274. Coincident with this purpose of free speech and association, in *Widmar* there were no state laws requiring compulsory attendance or mandatory teacher supervision.

In contrast, the public school's preeminent purpose has been distinguished as that of education, rather than of public forum expression. *See Bd. of Educ. of Island Trees* v. *Pico*, 457 U.S. 853 869-70 9 (1982); *Ambach* v. *Norwich*, 441 U.S. 68, 76-77 (1979) (purpose of public high school is not marketplace of ideas but rather "preparation of individuals for participation as citizens"); *Ellis* v. *Dixon*, 349 U.S. 458 (1955). *See also McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring) ("The public school is . . . the most pervasive means for promoting a common destiny").

Furtherance of this government educational purpose in the public schools requires extensive certain government involvement -- with both establishment and free speech implications.

As concerns establishment, the constant presence of school appointed monitors carries with it the impression of official approval and endorsement, particularly when the state compulsory educational system encourages attendance at meetings of such groups. *See Bender*, 741 F.2d at 555. *See also Zorach*, 343 U.S. 306, 308-9 (1951). Religious activities organized in the " 'captive audience' setting of a school pose unconstitutional government approval." *Brandon*, 635 F.2d at 978.

But the same government involvement also challenges the claim to a public forum or free speech mandate posited in the school. The school is involved in limiting the forum so as to pursue educational goals. In Williamsport, for example, the board of

4431 (March 27, 1985). There was no need to balance conflicting first amendment concerns because the court of appeals found that the nature of the forum and its hypothetical availability to a broad range of expression raised a public forum mandate and no contervailing establishment concern. 739 F.2d 716, 722. Notwithstanding the Second Circuit's decision, it is dubious whether mere availability as opposed to an actual preexisting array of expression is sufficient to satisfy this Court's test in *Widmar*, 454 U.S. at 274.

directors reserved the authority to limit clubs to those which "contribute to the intellectual, physical or social development of the students and as is otherwise considered legal and constitutionally proper." 741 F.2d at 544. That authority was exercised pursuant to state law limiting the use of the schools. 741 F.2d at 543, n. 6. Further, the compulsory attendance laws diminish principles of freedom of speech and association essential to public forums, which require that such expression rights be voluntary. *See Greer* v. *Spock*, 424 U.S. 828, 838 (1976); *Bender*, 741 F.2d at 552 ("within this more restricted environment, therefore, involuntary contact between nonparticipatory students and religious groups is inevitable"). *Id.* at 552. *Widmar*, 454 U.S. at 274 ("high school instruction is given in a structured and controlled environment and in more confined facilities than is normal in the open, free and more fluid environment of a college campus").

Accordingly the establishment factors present in the public school attendantly diminish the claim to any public forum mandate.

3. *Alternatives to Use of the Public Schools for Religious Expression Rights Diminish the Claim to Those Rights Herein*

There are many alternatives to the use of the public schools for organized religious expression. This Court has repeatedly held, most recently in *Jaffree*, 53 U.S.L.W. at 4670 n. 45, that the public schools are not necessary to "accommodate" the exercise of organized prayer. *Id. See also Abington*, 374 U.S. at 226. In rejecting free exercise claims to school prayer in *Abington*, this Court distinguished the public schools from other government property such as prisons, where there were no alternatives for prayer. *Id.* at 299. "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Id.* In this respect the high school child is differently situated than the university student who may very well be on an isolated campus. *See Chess* v. *Widmar*, 635 F.2d 1310, 1320 (8th Cir. 1980).

The importance of considering alternative forms for free expression rights has been emphasized by this Court in other nonreligious expression cases. In *Perry* v. *Perry*, in considering the use of the public school forum, this Court looked toward whether there are "alternative means of communication in the community." 103 S. Ct. at 955.

Accordingly, the existence of alternatives herein is crucial in gauging the nature of the putative equal access right to public school property. As the Third Circuit held in *Bender*, echoing this Court's decision in *Abington*, foregoing the use of the public schools for organized religious clubs does not impair the ability of the religious group to engage in its activities through other means, "outside of the school premises and at times other than during school hours." 741 F.2d at 560.

At least three alternatives exist to the use of the public schools at times associated with the school day. First, if religious activities are sought during the school day, students may leave the school grounds. *See Zorach* v. *Clauson*, 343 U.S. 306 (1952) (sustaining release time).

Second, group religious activities may be conducted on school grounds outside of times associated with the school day, when the public schools are used as public forums open to the community under state law. *See, e.g., Country Hills Christian Church* v. *Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983). Such use of the school premises at times which are absolutely separate from the school day may not invoke the state's imprimatur of.

> A distinction might be drawn where the school buildings are not otherwise in use, as at night or during a vacation period, when the building is, in a sense, surplus land. A religious activity conducted on the premises at such a time may not be viewed as part of the educational enterprise at all.

L. Tribe, *American Constitutional Law* 825 n. 12 (1978).[29]

Last, on school premises and during the school day, students and teachers may exercise their individual religious speech rights to pray, vocally or silently, or to read their Bibles. *See Jaffree*, 53

29. This same distinction has been drawn as concerns state action regarding equal protection concerns. *Cf. Knights of the KKK* v. *East*

U.S.L.W. at 4668 (holding first amendment protects "individual's freedom of conscience"). Exercise of these individual religious speech rights do not require action by the state schools and therefore are distinguishable from the equal access clubs at issue herein. *See, e.g., Tinker* v. *Des Moines*, 393 U.S. 503 (1969) (personal political free speech rights exercised by students and teachers in public schools). This distinction eludes petitioners, who would ground equal access club rights on personal free speech cases. *See* Brief for Petitioners at 30-33, *citing to Tinker*, 393 U.S. 503; *Russo* v. *Central School District*, 469 F.2d 623 (2d Cir. 1972) (sustaining teacher refusal to participate in flag salute), *cert. denied*, 411 U.S. 932; *James* v. *Board of Education*, 461 F.2d 566 (2d Cir.) (holding teacher arm band to be free speech), *cert. denied*, 409 U.S. 1042 (1972). Yet, this Court has distinguished personal free speech rights from those involving the state. *See Tinker*, 393 U.S. at 508.

This distinction between personal religious speech rights and those requiring state involvement for their expression, is essential as concerns the establishment question before this Court. *See* J. Swomley, draft article at 7, *to be published in The Christian Century* (1985). *See also* Note, 50 *Cinc. L.Rev.* 740, 780-783 (1981).[30] To the extent that religious speech sufficiently relies to effect its purpose on the "prestige, power and influence" of the state, *Abington*, 374 U.S. at 307 (Goldberg, J., concurring), government is implicated in the advancement of religion in violation of the establishment clause.

Baton Rouge, 578 F.2d 1122, 1128 (5th Cir. 1978) (upholding KKK use of school facilities when open to the public).

30. And, indeed, it is a distinction which petitioners impliedly accept. For in pressing the equal access club right as a personal speech right, *see* Petitioner's Brief at 30-33, petitioners make no mention of teachers' free speech rights -- a right recognized by this Court in *Tinker*, 393 U.S. at 506. Yet if petitioners would ground equal access group prayer rights on the *Tinker* "individual speech rights," it is illogical to exempt teachers from those rights. Indeed, this teacher claim to equal access is now in the courts. *Mary Mae* v. *Evansville - Vanderburgh*, No. EV 84-165-C (S.D. Ind. filed June 8, 1984).

CONCLUSION

In his concurring opinion in *Abington*, 374 U.S. at 241-242, Justice Brennan declared:

> [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. The public schools are supported entirely, in most communities, by public funds -- funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions.

Id.

Given the alternatives available to the use of the state schools in group religious expression rights, they should not be so used. For to allow such use is to fundamentally change their "public function." Our experimentation with equal access has already reflected this change. The public schools are becoming divided along religious lines because of the threat equal access in the schools has posed to our religious pluralism.[31] That pluralism has

31. Pre Equal Access Act, these divisions split communities. *See, e.g., Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 16 ("hostile boorish behavior generated by this emotional controversy very clearly establishes the divisiveness along religious lines within the community.") This is paralleled post Equal Access Act, *see, e.g., Schools struggle with new law giving access to religious clubs*, N. Y. Times, March 23, 1985, at 25, col. 1 (discussing Christian club at Hicksville High School in Hicksville, Long Island, involving outside youth minister.) The schools have even turned to litigation to avoid the strife between religious factions. *See, e.g., Commack School District* v. *Rossi*, No. CIV-85-1288 (E.D. N.Y. 1985).

grown as our society has become more religiously diverse, *see Abington*, 374 U.S. at 240 (1963) (Douglas, J. concurring),and observant. *See generally*, J. Carroll, D. Jacobson, M. Marty, *Religion in America* (1979).

For their growth our religious pluralism and freedom have relied not on government institutions such as the public schools, but instead upon insulation from government. Protection of this religious freedom and diversity is the very reason for our first amendment mandate, *see Mueller*, 103 S. Ct. at 3069. We respectfully request that it not be abridged in this case, and for all the reasons set forth above, we ask that this Court affirm the judgment below.

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